



Local Programs Procedures

LPP 98-01 **Implement Executive Order W-172-98**

Reference: *Procedures Manual for Special Funded State Highway Projects;*
Local Assistance Program Guidelines

Effective Date: April 15, 1998

Approved: _____

Interim Assistant Program Manager
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This LPP implements the Governor's Executive Order W-172-98 for the Office of Local Programs. This implementation results in a modification to certain chapters of the *Procedures Manual for Special Funded State Highway Projects* and the *Local Assistance Program Guidelines*. Many other changes to these manuals are planned which will be covered in a manual change transmittal at a later time.

BACKGROUND

Recently, the Ninth Circuit Court of Appeals has determined in *Monterey Mechanical Co. v. Wilson*, that the provisions of Public Contract Code § 10115 et seq. requiring the achievement of minority and women business enterprise goals or good faith efforts to achieve the same are unconstitutional and violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, but did not address or invalidate the disabled veteran provisions of the statute.

As a result, Executive Order W-172-98 was issued and states, in part, that every State department cease any enforcement of the minority and women business enterprise participation goals and the good faith effort requirements related thereto under Public Contract Code § 10115 et seq. with respect to any nonfederally funded state contracts or amendments thereto awarded or entered, or proposed to be awarded or entered, on or after March 10, 1998. It also states that all actions, programs and regulations which seek to monitor, promote, or comply with the aforementioned provisions of the Public Contract Code § 10115 et seq. shall no longer be administered and where appropriate, be repealed.

This will not affect the disabled veteran business enterprise requirements of the Public Contract Code § 10115 et seq.

Caltrans - Office of Local Programs
April 15, 1998

EXISTING PROCEDURES

Instructions to comply with minority business enterprises (MBE) and women business enterprises (WBE) requirements, as they relate to projects involving Caltrans, are discussed in the *Procedures Manual for Special Funded State Highway Projects* and the *Local Assistance Program Guidelines*. Specifically, these instructions deal with contract provisions for projects with State funds or projects that are advertised, awarded and administered by Caltrans.

The instructions provided in the *Local Assistance Procedures Manual* pertain to Federal-aid project requirements. Therefore, it is not affected by this executive order.

NEW PROCEDURES

All MBE and WBE references in the *Procedures Manual for Special Funded State Highway Projects* and the *Local Assistance Program Guidelines* pertaining to non-Federal-aid projects, are now deleted. Instructions for non-Federal-aid projects where Caltrans advertises, awards and administers a project now make reference to disabled veteran business enterprises (DVBE).

This modification resulted in the following:

Procedures Manual for Special Funded State Highway Projects

- Section 8.51: Removed minority and women business enterprises, and references to Caltrans practices in the first paragraph.
- Section 8.53: Edited DBE instructions in the second paragraph to clarify for projects constructed without Federal funds; also included reference to DVBE.
- Table 8.1: Removed DBE requirements for State funded projects¹. Inserted DVBE requirements for Caltrans awarded projects.
- Section 16.3: Removed State or Federal funds from the first paragraph. Removed MBE/WBE requirements from Caltrans' awarded projects and replaced with DVBE requirements in the third paragraph. Clarified instructions for local Federal-aid projects in the fifth paragraph.

¹ DBE provisions not being required in local agency administered projects was a policy change done prior to this LPP, but not previously updated in the *Procedures Manual for Special Funded State Highway Project*.

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Local Assistance Program Guidelines

- Section 15.2: Under Disadvantaged Business Enterprise (DBE) Requirements, first and second bullet, removed the reference to WBE and replaced with DVBE.

Revised pages of the *Procedures Manual for Special Funded State Highway Projects* and the *Local Assistance Program Guidelines* are attached for your use. Hard copies of this LPP are available for downloading from the Internet by accessing the Local Programs Home Page at <http://www.dot.ca.gov/hq/LocalPrograms>.

Attachment

8.5 GUIDELINES FOR PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES

8.51 General Requirements

All project work shall incorporate the appropriate program for participation by disadvantaged business enterprises, minority business enterprises, and women business enterprises (DBE) as required by law and Caltrans practices. As indicated in Table 8.1, the specific DBE process to be followed depends upon the source of funding and which entity awards the construction contract.

Requirements for participation by disadvantaged business enterprises shall be specified in all cooperative agreements with public entities and in all highway improvement agreements with private entities.

8.52 Projects Financed Entirely with Local or Private Funds

Projects funded and administered entirely by a local or private entity are not required by Caltrans to have DBE provisions in their contracts; DBE programs are subject only to local or private option. However, DBE program requirements must be included if Caltrans awards and administers the construction contract.

8.53 Projects Financed Partially with State or Federal Funds

All contracts involving Federal funds must include the Federal requirements for participation by disadvantaged business enterprises, which are contained in Title 49 of the Code of Federal Regulations, Part 23. Normally, local jurisdictions which receive Federal highway funds already will have developed a local program to comply with the DBE requirements of the Federal regulations.

Projects funded partially with State funds, but not involving Federal funds, are not required to have DBE provisions. However, the disabled veteran business enterprises (DVBE) program requirements will be included if Caltrans administers the construction contract.

Table 8.1

DBE Requirements for Special Funded State Highway Projects [1]

| Entity Advertising, Awarding, and Administering Construction Contract | Source of Construction Funds | | |
|--------------------------------------------------------------------------------|---------------------------------------------------|-----------------------------------------------------|-------------------------------------------------|
| | Any Federal Funds | State Funds Only | No State or Federal Funds |
| State (Caltrans) | State Guidelines for Federal Projects | State Guidelines for State Projects [3] | State Guidelines for State Projects |
| Local Entity | Minimum of Federal Guidelines [2] | None Required | None Required |
| Private Entity | Minimum of Federal Guidelines | None Required | None Required |

[1] Caltrans' Business Enterprise Program is charged with certifying socially and economically disadvantaged business enterprises to meet Federal guidelines. The Department of General Services, Office of Small and Minority Business is charged with certifying disabled veteran business enterprises (DVBE). Local and private entities may accept these certifications as valid status of businesses.

[2] Federal guidelines require that a local entity develop and implement a DBE program and establish goals for participation by disadvantaged business enterprises for projects utilizing Federal funds.

Individual project goals will vary depending upon the nature of work to be performed and the known availability of qualified disadvantaged business enterprises located in the geographic area of the local entity.

[3] State guidelines are developed for the DVBE participation program. The statewide goal is no less than 3 percent.

16.2 OBTAIN PERMIT TO CONSTRUCT (ENCROACHMENT PERMIT)

Caltrans issues encroachment permits to ensure that a proposed activity is compatible with the primary uses of the State highway system, to ensure the safety of applicants and highway users, and to protect the State's investment in the highway facility.

Local and private entities proposing any activity which occurs within, under, or over a State highway right of way must apply to Caltrans to obtain an encroachment permit before such activity begins. All proposed projects must conform to Caltrans' standards and practices for planning, design, right of way acquisition and certification, and construction.

Procedures for obtaining encroachment permits for construction of all special funded projects costing more than \$250,000 are part of the project development process and are included in a cooperative or highway improvement agreement.

Encroachment permit applications for construction of locally funded, non-sales tax projects and privately funded projects with a construction cost of \$250,000 or less are reviewed and approved following standard permit procedures described in Caltrans' Encroachment Permit Information Guide.

All projects are reviewed appropriately to determine traffic, drainage, operation, maintenance, and environmental impacts on the State highway system. An encroachment permit will be issued if the project is acceptable, and when the application is considered complete by Caltrans.

16.3 ESTABLISH PROJECT GOALS FOR PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES (DBE)

Caltrans shall require that all construction contracts on the State highway system which are administered by Caltrans (regardless of funding), be subject to a DBE process as outlined below. The specific DBE process to be followed depends upon the source of funding and the awarding entity, as indicated in Table 8.1 in Chapter 8.

Federal law requires that all contracts involving Federal funds shall include the Federal DBE requirements described in Title 49 of the CFR, Part 23.

State law requires that all contracts which are awarded by Caltrans and which do not involve Federal funds shall adhere to the State's established DVBE process. The statewide participation goal is not less than 3 for DVBE. Individual project goals will vary depending upon the nature of work to be performed and the known availability of qualified DVBE located in the geographic area of the local entity.

Projects awarded, administered, and funded entirely by a local or private entity are not required to have DBE provisions in their contracts. Normally, local jurisdictions which receive Federal highway funds already will have developed a local program to comply with the Federal DBE requirements.

On a locally administered contract where the use of Federal funds requires the inclusion of DBE provisions, goals for DBE participation regarding the specific project are to be based upon the availability of such firms to participate in the bidding process in the geographical area of the contract; the project specific goals shall be reviewed and approved by the District's Local Assistance Office before advertisement of the project. Before award of the contract and issuance of an encroachment permit, the proposed utilization of DBE subcontractors by the apparent low bidder also must be evaluated by the District's Local Assistance Office to assure that the contract goals have been met or that a "good faith effort" has been made to meet the goals. The appropriate Caltrans' District oversight personnel will assist the Office of Local Streets and Roads in obtaining from the project sponsor the information needed for prompt reviews and approvals.

Contract compliance regarding the DBE process and goals shall be the responsibility of the resident engineer, who shall maintain records similar to those described in Section 9-03 (Disadvantaged Business) of Caltrans' Construction Manual. These records shall be reviewed by the State representative assigned to the project.

16.4 ADVERTISE FOR BIDS AND AWARD CONTRACT

Local or private entities sponsoring State highway projects which are financed with local and private funds are responsible for advertising and awarding the construction contracts for such projects.

Caltrans policy is to seek construction contract advertising, award, and administration by a local entity for special funded State highway projects with construction costs over \$250,000 which are financed primarily with funds other than State and Federal highway funds. In rare cases, Caltrans may permit a private project sponsor to administer the construction contract.

In certain cases, Caltrans will consider advertising and awarding a construction contract on a reimbursed basis for a locally funded project; factors in such considerations are outlined in Article 17.23.

Projects financed by a local or private sponsor with construction cost of \$250,000 or less, and work for a public utility, shall follow encroachment permit policy and procedure. Such projects should not be advertised before an encroachment permit is issued.

It also is Caltrans' policy that contract advertising, award, and administration shall not be divided among different entities; that is, the entity that advertises the project shall also award and administer the construction contract.

Responsibilities for contract advertising and award shall be described in a cooperative or highway improvement agreement executed by the project sponsor and Caltrans.

Caltrans must approve the PS&E, and right of way must be certified, before an encroachment permit is issued for a project.

Items not eligible are

- research, planning, and design
- acquisition of right of way and replacement housing
- maintenance
- administrative costs
- acquisition of buses or rail transit vehicles
- operating costs

Article XIX, Section 1 of the 1991 Statutes, states that revenues from motor vehicle fuel taxes may be used for public mass transit guideways. Only counties that have complied with Article XIX, Section 4 of the 1991 Statutes (i.e., have voter approval to use motor vehicle fuel taxes on mass transit guideways) may apply for SLTPP funds on mass transit guideway projects.

DESIGN STANDARDS

Project design standards are based on project type, location and fund source.

- State and Federal standards are required for projects on the State Highway System.
- Refer to *Local Assistance Procedure Manual*, Chapter 11 “Design Standards”, if Federal funds are involved.
- Projects on local streets and roads may use local standards.
- A rehabilitation project must extend service life by at least ten years.
- The minimum allowable thickness of asphalt concrete is 0.03 meters.

DISADVANTAGED BUSINESS ENTERPRISE (DBE) REQUIREMENTS

Applicable DBE project requirements are based on the agency administering the construction contract and fund source.

- If the project is advertised by the State, the State disabled veteran business enterprises (DVBE) program applies.
- If the project is advertised locally, State DBE requirements do not apply
- If Federal funds are involved, Federal DBE requirements apply.

15.3 PROJECT SELECTION PROCESS

AWARD

Although a project may be awarded as early as one year before the application deadline, reimbursement can only occur after:

- appropriation of funds,
- the final reimbursement ratio is established,
- the final list of eligible projects is published, and
- the Program Supplemental Agreement is executed